In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 327

KENNETH R. RICKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. A1-A14) is reported at 360 F. 2d 32.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1966 (Pet. A15) and a petition for rehearing was denied on June 2, 1966 (Pet. A15). On June 17, 1966, Mr. Chief Justice Warren extended

the time for filing a petition for a writ of certiorari to and including August 1, 1966, and the petition was filed on July 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether statements made by petitioner to an Internal Revenue agent who was examining his tax returns for possible fraud were inadmissible at his criminal trial for tax evasion because the agent, who had advised petitioner of his rights under the Fifth Amendment, had not advised him of his right to have counsel present during the interview.

STATEMENT

Petitioner was indicted in two counts for willfully attempting to evade his income taxes for 1960 and 1961 by filing false returns which did not report substantial income from sales of corporate stock and from dividends (I R. 2-3).[1] Petitioners conceded the deficiencies, and the only issue at the trial was whether they were willful (Pet. 3). The jury convicted him on the count pertaining to 1961 and acquitted him on the count pertaining to 1960. (I R. 2-3, 14). The question presented is whether evidence of statements he made to investigating agents of the Internal Revenue Service should have been excluded because he was not advised of his right to have counsel present during the interview (Pet. 2).

[1] Record references are to the six-volume record on file with the Clerk of this Court.

Revenue Agent Barr, who was assigned to investigate petitioner's 1960 return, requested petitioner's assistance in reconciling inconsistencies between the shares of stock held and sold during 1960 and the dividends received (III R. 174-177, 181-185). On May 8, 1962, petitioner telephoned Barr and said that he had omitted from the 1960 return the sale of $102,000 worth of stock, with a resulting tax deficiency of about $18,000 (III R. 185-186).

A few days later Agent Barr told Special Agent Mott of the Intelligence Division of the Internal Revenue Service about the investigation and the unreported 1960 stock sales. Mott told Barr to suspend his examination of the 1960 return and to ask petitioner to come in for a conference (IV R. 252-253). Mott thought there might be fraud, and his first task was to study the case to decide whether a fraud investigation was warranted (IV R. 253, 268).

Petitioner testified that Barr called him, said that he had discussed the situation with his superiors and that it would be satisfactory for petitioner to file an amended return, and requested him to meet with Barr and a Mr. Adrian (IV R. 285).[2] Barr, who did not remember mentioning Adrian's name, testified that he asked petitioner to meet with him and his superiors (III R. 227-228).

The meeting, held in the conference room of the Intelligence Division, was between Mott, Barr and petioner. Mott showed petitioner his credentials and

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[2] Adrian was the Chief of Fraud Investigation in the Audit Division (III R. 215).

told him that his job was to determine whether petitioner "had wilfully failed to report a substantial amount of capital gain income on his 1960 return" (IV R. 261). Mott advised petitioner of his right not to answer any questions or produce any documents that might incriminate him, and warned petitioner that anything he said or produced could be used against him (IV R. 262-266). Petitioner was sworn and with his consent a stenographic transcript was made of the interview (IV R. 310-311). Mott did not inform petitioner, who had passed the C.P.A. examination and worked as a corporate accountant and officer (V R. 425, 428, 430-432, 438, 442-443) and had served as an officer of a national organization of accountants (VI R. 556-557), that he could have counsel present at the interview (III R. 234, 239; IV R. 287).

Petitioner testified that he was unfamiliar with the functions of a Special Agent or of the Intelligence Division and did not know that the investigation might result in prosecution (IV R. 286-288). He knew that there was such a thing as criminal tax evasion (IV R. 293-294), and that "incrimination" meant that "anything I say or do can be used against me regardless of anywhere," including use in criminal proceedings (IV R. 290-291). He denied that Mott had said that he was investigating to see if the omission of income was willful (IV R. 294).

During the interview, petitioner discussed the understatement of income in his 1960 return (IV R. 332). He also stated that he had found an error in his 1961 return (*ibid.*), but that he preferred to dis-

cuss that point later (IV R. 333-334). Petitioner signed the transcribed questions-and-answers, and the transcript was introduced at the trial (IV R. 341).

The conference continued after the stenographer left the room (IV R. 334). According to Mott, petitioner stated that, after discovering the error in his 1960 return, he went to his broker's office to check his statements, and discovered that there had been an unreported gain of about $4000 on sales of stock in his wife's account (IV R. 334-335). Petitioner further told Mott that there was also a "technical item involving 1961"—petitioner had transferred stock with a market value of $28,000 to a contractor in payment for improvements the latter made in petitioner's home (IV R. 336-338). The stock, which was then worth $25.00 or $30.00 a share, had cost petitioner $3.00 (IV R. 337). Petitioner told Mott he viewed this as a tax-free exchange "because the work done by the contractor had no fair market value," and that he had not reported the transfer because "he wasn't aware that there was any place on the return to report such a transaction" (IV R. 336-338).

A week or two before the meeting, and before he had ever heard of petitioner, Mott had installed a microphone in the Intelligence Division conference room. Before petitioner arrived, Mott connected the microphone to a tape recorder in another room. Mott did not inform petitioner that the interview was being recorded (IV R. 269). After the interview, petitioner gave a different explanation of how he had ascertained the omissions from his 1961 income, and

Mott discovered the discrepancies in petitioner's explanations when he subsequently reviewed the recording (IV R. 338-341, 377). The recording was not introduced in evidence, but it was furnished to petitioner's counsel during the trial (IV R. 341).

At the trial, petitioner moved to suppress his statements made at the interview on the ground that they had been obtained from him in violation of his right to counsel under the Sixth Amendment (IV R. 297). Although petitioner conceded that there was "no question * * * as to the voluntariness of the statements" and that he was aware that "he was entitled to take an attorney with him to that meeting," he contended that "he was not aware that this had now become a criminal fraud investigation" (IV R. 297, 300). The district court denied the motion to suppress. It accepted Mott's testimony and ruled that Mott had "fully and clearly" advised petitioner of his Constitutional rights (IV R. 306). The court of appeals affirmed *per curiam*, on the authority of its recent decision in *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, June 20, 1966 (No. 965, 1965 Term).

ARGUMENT

The sole question presented is whether statements that a taxpayer made to an Internal Revenue agent who was examining his returns for possible fraud were inadmissible in his criminal trial for income tax evasion because the agent, although advising the taxpayer at the interview of his rights under the Fifth Amendment, failed to inform him that he could have

an attorney present. The identical issue was presented last Term in *Kohatsu* v. *United States* (No. 965), and this Court denied certiorari in that case on June 20, 1966, one week after its decision in *Miranda* v. *Arizona*, 384 U.S. 436. The reasons which led this Court to deny review in *Kohatsu* are equally applicable here, and call for the same result. Rather than repeat them, we refer the Court to pages 4-6 of our brief in opposition in that case, a copy of which is being furnished to counsel for petitioner.

Petitioner attempts to distinguish *Kohatsu* on four grounds (Pet. 14-15). These factual distinctions, however, do not avoid the two basic legal propositions upon which that decision rests: (1) A taxpayer who voluntarily discusses his tax return with an Internal Revenue agent considering possible fraud is neither in custody nor under any restraint, and therefore is not subject to the kind of coercion or pressure that the rule in *Miranda* is designed to avoid. (2) At the time of such interview, the proceding is investigatory rather than accusatory. Thus, in the present case agent Mott, whose testimony the district court accepted (IV R. 306), testified that in interviewing petitioner his purpose was only to determine whether a fraud investigation was warranted (IV R. 252-253, 268); and that he did not decide to make such an investigation until after the interview (IV R. 274).

In any event, even if the Court were to consider extending the rule in *Miranda* to cover statements made by a taxpayer during a voluntary interview with an Internal Revenue agent, as petitioner urges it to do (Pet. 15-16), this would not be an appro-

priate case for considering the problem. For in *Johnson* v. *New Jersey* (No. 762, O.T. 1965), this Court held that *Miranda* was to be applied only to those cases in which the trial began after the decision in *Miranda*, *i.e.*, after June 13, 1966. The trial in the present case, however, took place more than a year before *Miranda*—in April 1965.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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